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Reversals of cases by appellate courts, on the ground of too restricted cross examination of a witness by the trial court, are not frequent, as the limits of the right of cross-examination are, as a rule, within the discretion of the trial judge. But such a case is Taggart v. Bosch, 48 Pac. Rep. 1092, recently decided by the Supreme Court of California. The contest there was over a forged note, and the evidence as to its genuineness or falsity was evenly balanced between the parties. No impeachment of the parties was attempted and the veracity of the parties had to be determined by the jury. Yet the burden of proof was upon the plaintiff, and, to enable him to recover, the evidence must preponderate in his favor. Under such circumstances the conduct or declaration of the plaintiff, as to all matters or circumstances which tended to weaken or destroy his direct testimony that the defendant did execute and deliver the note, was competent and proper subjects upon which to cross-examine him, and a full and unrestricted cross-examination, within the limits hereinbefore stated, was, under the circumstances, of the utmost importance to the defendant. "It was held in Jackson v. Water Co., 14 Cal. 18," says the court, "that a cross-examination cannot go beyond the subject-matter of the evidence in chief, but should be allowed a very free range within it; that, where the defendant on cross-examination simply aims to disprove by the witness the very cause the witness himself has made, the rule excluding such evidence until defendant opens his case has no application. See, also, Harper v. Lamping, 33 Cal. 647, 648; People v. Lee Ah Chuck, 66 Cal. 667, 6 Pac. Rep. 859; Wixom v. Goodcell, 90 Cal. 623, 27 Pac. Rep. 419; McFadden v. Railway Co., 87 Cal. 464, 25 Pac. Rep. 681. A witness may be asked any question upon cross-examination which tends to test his accuracy, veracity, or credibility, and the court should be especially liberal where the witness is a party to the suit. Neal v. Neal, 58 Cal. 287; Greenl. Ev. sec. 446. That the court erred in the above rulings is apparent; and it is equally well settled 'that every error is *prima facie* an injury to the party against whom it is made, and it rests with the other party clearly to show, not that probably no hurt was done, but that none could have been or was done, by the error.' Jackson v. Water Co., 14 Cal. 25; Carpentier v. Williamson, 25 Cal. 167; People v. Ybarra, 17 Cal. 167, 172; Rice v. Heath, 39 Cal. 609; Cleary v. Railroad Co., 76 Cal. 240, 18 Pac. Rep. 269."

Upon the subject of this case the *New York Law Journal* makes these pertinent remarks: "The general consideration is suggested by this case that every error is *prima facie* an injury to the party against whom it is made, and that the burden is on the other party to show that no actual harm could have occurred. This principle does not prevent the affirmance of any judgment as to which a technical error against the defeated party appears in the record. Every lawyer of experience knows that a record in a case of considerable length, which discloses no ground of technical criticism, is a comparatively rare thing. Even in jury cases appellate courts frequently follow the dictates of justice and affirm judgments, in the obtaining of which slight and obviously immaterial errors occurred. At the same time this California case is a salutary illustration of the disposition of courts to reverse a judgment, where it is not apparent that substantial justice was done, although it would have been quite easy to dispose of the matter the other way by holding—as is undoubtedly the general rule—that the limits of cross-examination are within the discretion of the trial judge. The California case furnishes an example of the same judicial spirit which led an appellate court of one of the States, a few months ago, to set aside a criminal conviction and order a new trial, solely and expressly on the ground that the defendant had been represented by incompetent counsel, and that therefore his substantial rights had not been adequately guarded on his trial."

The case of Lamond v. Richard, 1 Q. B. 541, recently decided by the Court of Appeals of England, involves a novel question as to the liability of hotel to guests, which is worthy of notice. The facts were as follows: Plaintiff came in November, 1895, to the

Hotel Metropole, at Brighton, of which the defendant was the manager, and stayed there until August, 1896, paying her board regularly. Her condition and conduct were not such as to justify the defendant in refusing her accommodations. On August 25, 1896, by order of the directors of the corporation which owned the inn, the undermanager had an interview with her, in which he asked her when she was going to leave the hotel; and on her replying that she should stay there as long as she liked, he gave her verbal notice that her room must be at the manager's disposal by noon on the 27th. She did not leave on that day; and on the 31st she was told that she must leave, and that if she declined to do so, her luggage would be packed up by the hotel servants. In the afternoon she went out for a walk, and on her return was refused admission. Her things had been packed by servants and brought down into the hall, whence they were subsequently removed by the plaintiff. There were vacant rooms in the hotel at the time, and the plaintiff's room was not required for the accommodation of other guests. On these facts the court held, that the common law liability of an innkeeper to receive and lodge a guest attaches only so long as the guest is a traveler, and a person who has been received at an inn as a traveler, does not necessarily continue to reside there in that character; that it is a question of fact whether the guest is still a traveler at any given time during his residence at the inn, and one of the ingredients for determining this fact is the length of time that has elapsed since his arrival; and that if the guest has lost the character of traveler, the innkeeper is not bound to supply him with lodging; but is entitled on giving reasonable notice to require him to leave, and affirmed the judgment of the county court for the defendant, on the ground that the hotel was a "common inn."

NOTES OF RECENT DECISIONS.

POWER OF CONGRESS—POSTAL REGULATIONS—"FRAUD ORDERS"—RIGHT OF CITIZEN TO USE MAILS.—The United States Circuit Court for the District of Kentucky holds, in Hoover v. McChesney, 81 Fed. Rep. 472, that the Act of Congress March 2d, 1895, extending the powers of the postmaster general, conferred by Rev. St. § 3929, as amended by Act Sept. 19, 1890 (26 Stat. ch. 908), § 2, by authorizing him, on a determination upon evidence satisfactory to him that a person or company is using the mails for the purpose of conducting a lottery or other fraudulent scheme, to order a postmaster to return all mail received at his office directed to such person or company, or his or its agents or representatives, is within the power of congress to prescribe what matter shall be excluded from the mails, so far as applied to a corporation whose business has been so determined to be in violation of the postal laws, or to its officers, such order being but a mode of excluding matter which may be presumed to be non-mailable. A citizen of the United States, they say, has a property right in the use of the mails for lawful purposes, of which he cannot be deprived without due process of law; hence congress has no power to confer authority on the head of the postal department, upon a determination on evidence satisfactory to him that a citizen is using the mails for the purpose of conducting a lottery or other fraudulent scheme, to issue an order instructing a postmaster to return or send to the dead-letter office all mail matter coming to his office directed to such person, without regard to whether such matter is or is not non-mailable. It is also held that the refusal by a postmaster to deliver mail matter addressed to a private person, who is a citizen of the United States, and the return of such mail to the senders, or to the dead-letter office, without regard to whether it is non-mailable, though done in pursuance of an executive order of the postmaster general, on a determination by him that the person to whom such mail is addressed is using the mails for unlawful purposes, is a violation of the fourth amendment to the constitution, securing the people against unreasonable seizures of their papers and effects, and that the circuit court has jurisdiction to grant an injunction restraining a postmaster from withholding mail matter from a citizen to whom it is directed, under an order of the postmaster general which was beyond the scope of his constitutional authority.

STRIKES AND STRIKERS—DAMAGES FOR INDUCING EMPLOYEES TO STRIKE.—In connection

with the recent strikes the case of O'Neill v. Behama, 37 Atl. Rep. 843, lately decided by the Supreme Court of Pennsylvania, is of special value. It was held that where persons are going to a place of employment, either under contract to work or in search of work, others have no right to stop them and occupy their time without their consent, or that of their employer if they are actually employed, in order to urge or prevail upon them, even by peaceable means, not to go to work; and that persons so doing may be liable to the employer in damages. The bill was originally filed for an injunction and damages, and the point of special interest is suggested by the following language with which the opinion of the court concludes: "Not the least notable feature is the expression of surprise by the counsel, and even by the court, that the case was pushed after the strike was over. It appears to be a fact that the strike was less violent and disorderly than others which had preceded it, and a sentiment seems to have pervaded the community—even the court not being entirely exempt—that, the strike being over, the subject had better be dropped. This is not law nor justice. A plaintiff who might have been hurt worse than he was may be inclined not to push his claim for compensation for the injury actually received; but it is for him, and not for others, and especially not for courts, to make the choice, and there should be no judicial surprise if he insists on his rights, though other men may think discretion the better part of valor." The right to injunctive relief against boycotts and some of the incidental oppressive measures resorted to both by boycotters and strikers is now quite well settled. The case of Vegelahn v. Guntner, in the Supreme Court of Massachusetts, 44 N. E. Rep. 1077, will be remembered, in which it was held that the maintenance of a patrol in front of a plaintiff's premises, in furtherance of a conspiracy to prevent, either by threats and intimidation or by persuasion and social pressure, any workmen from entering into, or continuing in his employment, will be enjoined. This recent Pennsylvania case goes further and expressly upholds the power to recover damages sustained by reason of the illegal acts.

CONTRACT — CONSIDERATION — AGREEMENT BY LEGATEES OF WILL. — The Court of Appeals of Kentucky has recently decided in the case of Waller's Adm. v. Marks, that an agreement by the legatees under a will to pay to one of several persons proposing to contest the will a certain sum of money in consideration of his agreement to withdraw his opposition to the probate of the will, and to assist in its probate, is enforcible, not being against public policy or in violation of the laws against champerty and maintenance. The court said in part:

It seems to us to be well settled that a compromise or surrender of an apparently equitable claim is a sufficient consideration to support a promise to pay. In the case at bar the pleadings of appellant show a clear case of an equitable claim if not a legal claim. The appellee's interest, it seems, was to some extent antagonistic to that of the intestate, and also opposed to the supposed interest or claims of some others. Now, to avoid litigation or to lessen or narrow the same, the contract in question is entered into by which, if appellees succeed in obtaining the amounts which they were contending for, they would pay to the intestate the sum he was claiming; otherwise he would and did surrender his claim, and also agreed to assist appellees in the common object, viz., to secure that which they all believed was justly due them. Moreover, the presumption of law was that the will then in contest was the true will of the testatrix, and that presumption is fortified by the fact that two courts sustained the will. Suppose that A and B were both claiming an interest in a tract of land, and had reasonable grounds to so claim, and that C and others were claiming the same land, no one being in possession, would not A have a right to contract with B to relinquish his claim and aid B in his contest with C and others upon the condition that if B succeed that B would convey fifty acres of the land to him (A)? It seems clear to us that the contract in question is not in violation of public policy, and does not tend to obstruct justice or hinder the proper enforcement of the law. The second contention of appellees is that the contract is in violation of the laws against champerty and maintenance. In support of that contention some decisions of this court are cited. Lucas v. Allen, 80 Ky. 681, is not applicable to this case. Lucas was an officer of the city of Louisville, and agreed to furnish information, etc., by which the payees could recover taxes illegally collected by the city, for which he was to have a certain portion of the money so recovered. It was properly held that he could not enforce such a contract. In Young v. Evans, 8 Ky. Law Rep. 353, a superior court decision, it appeared that a party had contracted with the administratrix to cancel a debt he had on her if she would not file exemptions to a claim he had filed against her as administratrix of her daughter. It was properly held in that case that the contract could not be enforced. The reason is obvious. It was an attempt by the creditors to hire the administratrix to omit a judicial duty. Brown v. Beachamp, 5 Monroe, 413, is also cited by appellee. It will be seen from the opinion cited that Richardson had no interest in the suit, but agreed with one of the parties to aid them in the litigation and if successful, was to have part of the land in contest. The court held that such a contract was illegal and could not be enforced. The court said that "maintenance signifies an unlawful taking in hand and

upholding of quarrels or sides to the disturbance or hindrance of common rights, * * * as where one assists another in his pretensions to certain lands, or stirs up quarrels and suits in the country in relation to matters wherein he is in no way concerned, or where one officiously intermeddles in a suit depending, which no way belongs to him by assisting either party with money or otherwise." Champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it. It will be seen from the foregoing that the contract in question is not in violation of the law as to champerty and maintenance.

CONSTITUTIONAL LAW—STATUTES—ARE ENROLLED BILLS CONCLUSIVE.—In view of the frequent violation of constitutional rules as to the passage of laws by modern legislatures, it is of some profit to read the ruling of the Supreme Court of Appeals of West Virginia, in Price v. City of Moundsville, 27 S. E. Rep. 219. The challenge against the law under consideration was that the house journal did not affirmatively show the bill to have been read three times, as demanded by the constitution of the State. The court said:

At the very threshold of this case comes up the inquiry as to whether this court is bound by the enrollment of the bill, as an absolute verity, and therefore precluded from making inquiry as to whether constitutional requirements have been fulfilled in its enactment. The common law, or English rule, which has been followed by the Supreme Court of the United States, as to congressional enactments, and many State courts, is that the enrollment, ratification, and approval of an act of the lawmaking branch of the government render the same conclusive and unimpeachable, and forever preclude the judiciary from inquiring into the procedure in relation thereto prior to its enactment. In England there is no written constitution controlling the legislative branch of the government, and the acts of parliament, being regarded in their nature as judicial,—as emanating from the highest tribunal in the land,—are placed on the same footing and regarded with the same veneration as the judgment of the courts, which cannot be collaterally attacked. With regard to the enactments of congress, there is no provision in the constitution of the United States authorizing the courts to inquire into their constitutionality, either as to the procedure in enactment, or as to whether the subject-matter of the act conforms to the constitution. By usurpation, in the first place, as is sometimes claimed, the Supreme Court of the United States invested itself with the authority to determine whether an act of congress contravened the express provisions of the constitution; but when it came to the question as to whether the court should further usurp the right to go behind the solemn authentication of an act, and determine whether, in the enacting procedure, constitutional requirements had been adhered to, the court stopped short, and held that the respect due to co-equal and independent divisions of the government requires the judicial department to rely on the solemn assurance of the legislative and executive departments that in the passage of the act the required constitutional procedure had been fully complied with in all respects. Field v. Clark, 143 U. S. 649, 12 Sup. Ct. Rep. 495. The constitution of this State is not a grant to, but an express limitation of the powers of, the legislature; and while it divides the government into three co-ordinate departments (the legislative, executive, and judicial), and provides that they shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others (Const. art. 5, sec. 1), it imposes on the judiciary the duty of deciding the constitutionality of a law, without limitation; thus not only authorizing inquiry as to whether the act itself is within constitutional limitations, but also as to whether the same has been enacted in conformity with the express mandates of the constitution. There is no such comity between the separate departments of the State government as would require submission to the alleged acts of each other in violation or defiance of the express requirements of the constitution. No unconstitutional enactment in this State can interfere with the rights of private citizens unless it is sanctioned by all three of the departments of the State government. The constitution, as the expression of the will of the people, is the supreme law, and it is the duty of each department of the State government created by it to see that it is preserved inviolate. Their comity is first due to it, and then to each other. If one or more of the departments of the government can wholly disregard and nullify the wholesome provisions of the constitution, and then impregnably fortify themselves behind their own solemn authentication, this "solemn authentication" becomes a substitute for the constitution, and the mere will of the legislative or executive department, or both, becomes the will of the people, and the constitution is as though it never had been. Being brought into disrespect in one feature, the whole thereof is liable to the same disregard and irreverence. It is not a case of jealousy between the separate departments, but each one, in all its acts, should be ever ready to challenge the most careful scrutiny and investigation into its strict allegiance and loyalty to the spirit and letter of the instrument which gives it existence and clothes it with power. A different rule prevails in other States, dependent upon the provisions of the various constitutions as construed by their courts of last resort. See Carr v. Cook, 116 N. C. 226, 22 S. E. Rep. 16, where the question is fully discussed, with an elaborate note, in 47 Am. St. Rep. 801, 814. To the converse, see Spangler v. Jacoby, 14 Ill. 297, 58 Am. Dec. 571, and elaborate note. The rule established in these latter authorities is that "a bill duly enrolled, authenticated, and approved is presumed to have been passed by the legislature in conformity with the requirements of the constitution, unless the contrary is made to affirmatively appear; and the proof furnished by the journals of the two houses in the matters of procedure must be clear and conclusive, to overcome this presumption." The journals must affirmatively show the omission by the legislature of some essential constitutional requirement, to overcome the presumption of validity. Heretofore this court has followed this rule. Osburn v. Staley, 5 W. Va. 85."

MUNICIPAL CORPORATION—ABATEMENT OF NUISANCE—POWER OF CITY—CONSTITUTIONAL LAW.—In Harrington v. Board of Aldermen, 38 Atl. Rep. 1, decided by the Supreme Court of Rhode Island, it was held that an owner has no constitutional right to notice, before the passage of an order by the aldermen of

a city, that he should destroy a privy vault on his premises, pursuant to R. I. Pub. Laws, April 25, 1889, ch. 777, as amended by chapter 1407 of March 1, 1895, as such nuisance may be summarily abated. The court said in part:

In the celebrated Trinity Church Case Health Dept. of City of New York v. Rector, etc. of Trinity Church, 145 N. Y. 32, 47, 39 N. E. Rep. 833, Mr. Justice Peckham gave expression to this *obiter dictum:* "This is not the case of a proceeding against an individual on the ground of the maintenance of a nuisance by him; nor is it the case of an assumed right to destroy an alleged nuisance without any other proof than the decision of the board itself (with or without hearing) that the thing condemned was a nuisance; nor is it the case of the destruction of property which is in fact a nuisance, without compensation. Where property of an individual is to be condemned and abated as a nuisance, it must be that somewhere between the institution of the proceedings and the final result the owner shall be heard in the courts upon that question or else that he shall have an opportunity, when calling upon those persons who destroyed his property to account for the same, to show that the alleged nuisance was not one in fact. No decision of a board of health, even if made on a hearing, can conclude the owner upon the question of nuisance." Mr. Justice Peckham's *dictum*, just quoted, is claimed by both appellants and appellees in this case as favoring their respective contentions, but rightly understood, it would seem beyond peradventure to favor the appellees. The case of Miller v. Hornton, 152 Mass. 540, 26 N. E. Rep. 100, affords an apt illustration of Mr. Justice Peckham's meaning. This was tort for the summary killing of a horse that had been adjudged by the commissioners on Contagious Diseases Among Domestic Animals, under St. 1887, ch. 252, had the contagious disease known as "glanders" or "farcy," and for the killing of which an order had been issued by them, with no provision for compensation to the owner. The defendants admitted the killing, but justified that they did it in obedience to the order. The court below ruled the act to be constitutional, found that the horse killed was not afflicted with glanders or any contagious disease, and found for the defendants, *i. e.*, that the justification was sufficient. The whole of the supreme judicial court assumed the statute to be constitutional, a difference arising only as to whether, if the horse did not have the glanders as a matter of fact, the killing was justifiable under the order. The court stood four to three, the majority deciding that the killing was not justified, and the minority that it was justified, under the order. Holmes, J., in giving the opinion of the majority of the court, said, *inter alia:* "The language of the material part of section 13, Act 1887, is: 'In all cases of farcy or glanders, the commissioners having condemned the animal infected therewith shall cause such animal to be killed without an appraisal, but may pay the owner or any other person an equitable sum for the killing and burial thereof.' Taken literally, these words only give the commissioners jurisdiction and power to condemn a horse that really has the glanders. The question is whether they go further by implication, so that, if a horse which has not the disease is condemned by the commissioners, their order will protect the man who kills it in a subsequent suit by the owner for compensation. • • • When, as here, the horse is not only not to be paid for, but may be condemned without appeal, and killed, without giving the owner a hearing or even notice, the grounds are very strong for believing that the statute means no more than it says, and is intended to authorize the killing of actually infected horses only. • • • Section 13 of the Act of 1887 by implication declares horses with the glanders to be nuisances, and we assume, in favor of the defendant, that it may do so constitutionally, and may authorize them to be killed without compensation to the owners. But the statute does not declare all horses to be nuisances, and the question is whether, if the owner of the horse denies that his horse falls within the class declared to be so, the legislature can make the *ex parte* decision of a board like this conclusive upon him. That question is answered by the decision in Fisher v. McGirr, 1 Gray, 1. It is decided there that the owner has a right to be heard, and, further, that only a trial by jury satisfies the provision of article 12 of the declaration of rights that no subject shall be deprived of his property but by the judgment of his peers of the law of the land. • • • Of course, there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand, he may be heard afterwards. The statute may provide for paying him in case it should appear that his property was not what the legislature has declared to be a nuisance, and may give him his hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them."

There are many other cases which might be cited in reference to the non-necessity of notice before the passage of the order, but the foregoing are sufficient to satisfy us that no such notice is required. When the appellant is sued for the penalty, she will have her day in court, and a trial by jury, if she desires; and proof will have to be adduced to show that she had an unauthorized privy vault upon her premises to obtain a recovery against her. So, if an alleged privy vault upon her premises is filled up and destroyed, under alleged authority of said chapter 777, as amended by chapter 1407, she can bring suit against the persons doing the act for the supposed trespass, and when they attempt to justify under the statute she will have her day in court, and a trial by jury, if she desires, and the defendants will have to show that the alleged privy vault was actually a privy vault, and that it was unauthorized under the statute. Of course, if the thing declared by statute to be a nuisance, or the thing regulated or repressed under an exercise of the police power, is not a nuisance in fact, or within the province of the exercise of the police power, then the court will declare the statute unconstitutional, for the power is not to be used under the mere allegation, color, or pretense of being a proper exercise of the police power, when in truth it is not. But the legislature, as we have already seen, is to a great extent the proper judge of the necessity for the exercise of this restraining power.

WATERS AND WATER COURSES — RIPARIAN RIGHTS—DIVERSION OF WATER.—In Fisk v. City of Hartford, 37 Atl. Rep. 983, decided by the Supreme Court of Connecticut, it ap-

peared that a city, for many years, appropriated about one-half of the volume of a river the use of the waters of which belonged to plaintiffs who were riparian owners and mill proprietors. The greater part of the water was returned to the river in the form of sewage, so that plaintiffs sustained no substantial damages. The city thereafter, for the purpose of abating the nuisance caused by such sewage, built a sewer, diverting it from such street. It was held that, as the city, under its charter, had the right to dispose of its sewage as it saw fit, a bill by plaintiffs to enjoin it from so diverting "the sewage" would not lie, whether the city had or had not the right, as against plaintiffs, to take and use the water. The court said in part:

If the complaint could be regarded as one brought simply to enjoin the city from taking its water supply, or any part of it, from the tributaries of Park river, the case thus presented would be a very different one from the present case; but it cannot be so regarded. The complaint is not brought to have the city enjoined from diverting the water of Park river or its tributaries into the reservoirs and distributing pipes of the city, or from using the water so diverted, but it is brought to restrain the city from diverting its sewage into the intercepting sewer; and this is the very gist of the complaint. The allegations of the complaint are, in effect, that this sewage has heretofore been permitted to flow into Park river; that it is available for use at the plaintiffs' mills; that the city now intends to divert it into the intercepting sewer, past the plaintiffs' mills; that this will greatly lessen the flow of the river, to the plaintiffs' damage; that the city has no right to thus divert its sewage from Park river, and should be enjoined from doing so until it has paid or satisfied the plaintiffs' damages. It is true the complaint may be fairly said to allege, in effect, that the city gets its water supply from waters which belong to the plaintiffs, and that it has no right, as against the plaintiffs, to take and use such water as it does. But the complaint does not ask to have such taking and use enjoined against. It only asks to have the city enjoined from disposing of that water after it has become sewage.

Now, it is quite clear that the city either has, or it has not, the right, as against the plaintiffs, to take and use the water which constitutes its supply, as set th in the complaint; and in either case we think it equally clear that the city has the right, as against he plaintiffs, to dispose of that water after it enters the sewerage system as sewage, under its charter, as t sees fit. In other words, the plaintiffs may or may not have the right to have the whole or a part of the water supply of the city returned as water to Park river; but in either case they have no right to have it so returned after it has become sewage, or to have it returned through the sewerage system of the city, which are in effect the rights claimed in the present case. If the city has the right, as against the plaintiffs, to take and use the water in its reservoirs, then, clearly, it has the further right, as against them, either before or after it is used, to dispose of it under its charter as it sees fit. If, on the other hand, it has no right, as against the plaintiffs, to take or use the waters in its reservoirs, which is, we think, the case stated in the complaint, this fact of itself does not give the plaintiffs a right to control the disposition of such water after it has entered the sewerage system and becomes sewage. That control still remains with the city, and ought to remain with it.

As the court is bound to take judicial notice of the city charter (Gen. St. sec. 1087), we know that full control over its sewerage system, and over the disposal of sewage, is conferred upon the city; and there is nothing in the entire record which shows any loss of such control, or which shows that the plaintiffs have any rights which the city is bound to consider in dealing with its sewer system or in dealing with the disposal of sewage. In this view of the case it makes no difference whether the sewage is or is not injurious to health, or whether its open flow has or has not otherwise become a nuisance. In either case the city still has, and ought to have, full control over it and the pipes, drain and sewers through which it flows, or can be made to flow. If the city wrongfully takes and uses the plaintiffs' water, the remedy for such a wrong is ample, either by an action at law for damages, or, in a proper case in equity, by injunction; but where, as in this case, the plaintiffs apparently condone the wrongful taking and using of the water, on condition that it shall be allowed to come back to them in the form of sewage through the city sewers, and assert a right to sewage as such, and to have it flow through the sewers as it has been accustomed to flow, they cannot have the remedy which they now seek, simply because they have not shown that they possess any such right. The complaint clearly shows that it is the sewage of the city, and not the waters of Park river or its tributaries in any proper sense, which the city is about to turn into the intercepting sewer; and it is this precise diversion and nothing else which the plaintiffs seek to have enjoined. For the reasons given, we are of opinion that they are not entitled to the injunction.

MISCONDUCT OF COUNSEL AT TRIAL.

The right of a party to an action to be heard by himself or counsel at trial is an invaluable one, and is guaranteed as a constitutional privilege. A party has this unqualified right to present the reasons for his contention, the one way or the other unhampered, to the end that the benefit that may be derived from legitimate argument and reasoning may be his. The conduct of a case in court is a most essential feature of a lawsuit, and frequently, especially in closely balanced cases, the power of the advocate may turn the scales in favor of his client. The right to be heard in argument, however, is a privilege which may be abused. It embraces only such argument as is legitimate and within the recognized rules of procedure. Counsel must be fair in argument; not only to himself and his client, but to the court, and even to the opposite side, as well. The instant he departs

from the bounds within which is legitimate argument, he is not only guilty of unprofessional conduct which no high-minded lawyer would approve, but he is endangering the very cause which he has so zealously espoused. Any course of argument not sustained by the evidence, any unfair allusion of any kind not warranted by the record, any effort to arouse the prejudices of a jury against his opponent or in favor of its client, or an attempt to array their feeling or indignation to the end that he may thereby win his case, may be ground for reversal at the instance of the party aggrieved by such conduct, where the question is properly reserved for appeal.[1] As has been well said: "It is essential to the proper administration of justice, frail and uncertain at best, that all that can be said for each party, in the determination of fact and law, should be heard. Forensic strife is but a method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him, but counsel is out of his duty and his right, and outside the principle and object of his profession, when he travels outside his client's case and assumes to supply its deficiencies. * * * He has neither duty nor right to appeal to prejudices, just or unjust, against his adversary, *de hors* the very case he has to try. The very fullest freedom of speech, within the duty of his profession, should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on the facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof."[2] Again, "The counsel represents and is a substitute for, his client; whatever, therefore, the client may do in the management of his case, may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects him in it. The right of discussing the merits of the cause, both as to the law and facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his address to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify or condemn motives, so far as they are developed in evidence; assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it, and he may, if he will, give play to his wit, or wings to his imagination."[3] But a course of argument in an advocate may be open to criticism and still not ground for reversal. It must be such departure from the record or improper course of argument as is well calculated to unduly or unfairly influence or sway the jury. It must not only be improper, but prejudicial as well.[4] Every little trivial diversion will not warrant a reversal. In the heat of debate, either side may exaggerate things a little, or tread narrowly upon the line of propriety, and this is nearly always true in stubbornly fought cases. Juries are presumed to be men of intelligence, nor will it be supposed that they readily allow themselves to be misled by every little frivolous matter that may not be strictly and rigidly within the record; were it otherwise, there would be but few strongly contested cases which could withstand an appeal.[5] But it is not sufficient that counsel travel out of the proper line of argument. The opposing side may elect to condone or waive it. If it be desired to take advantage of the improper conduct it is necessary that objections be properly made thereto at the time, and if the ruling be prejudicial, the party objecting, must bring the matter upon record by bill of exceptions or assignment of error, to the end that the matter may be reviewed by the appellate court. A failure so to do, will cut off

[1] Cleveland Paper Co. v. Banks, 15 Neb. 22; Missouri Pac. Ry. Co. v. Metzer, 24 Neb. 90; Brown v. State, 103 Ind. 133; Davis v. Brown (Ky.), 36 S. W. Rep. 534; Parks v. State (Tex. Cr. App.), 33 S. W. Rep. 872; Union Compress Co. v. Wolf (Ark.), 37 S. W. Rep. 877; Kansas City, Ft. Scott & Memphis R. R. Co. v. Sokal, 61 Ark. 130; Gulf, Colorado & Santa Fe R. Co. v. Hockaday (Tex. Civ. App.), 37 S. W. Rep. 475; Smith v. Nippert, 79 Wis. 130; Santry v. State, 67 Wis. 67.

[2] Brown v. Swineford, 44 Wis. 282.

[3] Tucker v. Henniker, 41 N. H. 317, 323.

[4] Mutual Life Ins. Co. v. Selby, 72 Fed. Rep. 980; Daly v. Melendy, 32 Neb. 582; Festner v. Omaha & S. W. Ry. Co., 17 Neb. 280; Guinea v. People, 37 Ill. App. 450; Galveston, H. & S. Ry. Co. v. Johnson, 85 Tex. 431.

[5] Shroeder v. State (Tex. Cr. App.), 36 S. W. Rep. 94.

any right he might otherwise have had, for this cause, to reverse the judgment.[6] And the better practice, if not the only proper way in such cases, is to ask the court to instruct the jury, to disregard the objectionable remarks. The rule is akin to that in cases where an instruction is given by the trial court over the objections of one party. It is not sufficient, generally, that the party merely object, and ask that his exceptions be noted of record; but he must point out his objections specifically, and ask an instruction in accordance with the view of the law taken.[7] The objection in any event must be taken, too, before the jury retire. Otherwise, it cannot avail.[8] But while remarks of the adversary may be highly improper, yet they cannot avail the objecting party when they have been legitimately called forth in reply to, or by reason of, like improper remarks of the party objecting.[9] The law never presumes prejudice from any misconduct of counsel in the course of a trial unless the record facts preclude any other theory. It is generally necessary that those complaining make the affirmative showing that injury resulted; otherwise the presumption that the court exercised a sound discretion, and that the jury did their sworn duty in the case controls.[10] But it is proper and, really, the duty of the trial judge, when he sees counsel departing from the record to the prejudice of the opposite party, to stop him and reprove him for his misconduct in the presence of the jury, even though no request to this effect be made.[11] And if, in pursuance of this duty, or by request of counsel on the opposite side, the court reprimands the counsel and instructs the jury to disregard the objectionable conduct, the error, if any, arising because of the remarks, will be regarded on appeal, as cured by the affirmative instruction of the court.[12] There is a wide latitude allowed a trial judge in exercising a sound discretion. He has the management and supervision of all the proceedings at *nisi prius* and is in a position to see better than the appellate court whether, by reason of any improper conduct of counsel, an injury has been done to either party. And as all sworn officers are presumed to have done their official duty, the appellate courts defer largely to the trial judge, and presume readily that if, under all the circumstances of the case, and in view of all its phases, as it appeared in the trial court, the trial judge should have granted a new trial, he would have done so. Unless this discretion is shown affirmatively to have been manifestly abused, it will not be controlled on appeal.[13] The trial judge should exercise greater caution, perhaps, in excluding improper remarks of counsel in the closing argument than in the opening or that following, for the reason that the other side is then necessarily at a

[6] McLean v. Scrips, 52 Mich. 214; State v. Gray (Mont.), 44 Pac. Rep. 411; Levine v. State (Tex. Cr. App.), 34 S. W. Rep. 969; Bohanan v. State, 18 Neb. 57; Eldridge v. Stewart (Iowa), 66 N. W. Rep. 891; State v. Abrahams, 11 Or. 169; Penn v. State (Ala.), 19 South. Rep. 504; Masterson v. State (Ind.), 43 N. E. Rep. 138; Hare v. State (Tex. Cr. App.), 34 S. W. Rep. 623; Ball v. State (Tex. Cr. App.), 34 S. W. Rep. 750; State v. O'Keefe, 43 Pac. Rep. 918; State v. Biggerstaff (Mont.), 43 Pac. Rep. 709; State v. Johnston (Ala.), 19 South. Rep. 213; Hines v. State, 32 S. W. Rep. 701; Exon v. State (Tex. Cr. App.), 33 S. W. Rep. 336; Morris v. State (Tex. Cr. App.), 33 S. W. Rep. 539; Bradshaw v. State, 17 Neb. 147; McLain v. State, 18 Neb. 154.

[7] Levine v. State (Tex. Cr. App.), 34 S. W. Rep. 969; Rogers v. State, 60 Ark. 76; Vaughn v. State, 58 Ark. 353, 373; Jackson v. State (Tex. Cr. App.), 37 S. W. Rep. 430; Price v. Pankhurst, 53 Fed. Rep. 312, 3 C. C. A. 551; Beaver v. Taylor, 93 U. S. 46; Block v. Darling, 140 U. S. 234; St. Louis, I. M. & S. Ry. Co. v. Spencer, 71 Fed. Rep. 93; Beckwith v. Bean, 98 U. S. 266; see also Hurley v. State, 19 Ark. 17; Blackburn v. Morton, 18 Ark. 384, 392; U. S. v. Conklin, 68 U. S. 644; Harvey v. Tyler, 2 Wall. 328; Moore v. State (Tex. Cr. App.), 28 S. W. Rep. 686.

[8] Price v. Pankhurst, 53 Fed. Rep. 312; Bracken v. Union Pac. Ry. Co., 56 Fed. Rep. 447, 450.

[9] Moore v. State (Tex. Cr. App.), 28 S. W. Rep. 686; Hoffman v. State, 65 Wis. 46; Barczynski v. State (Wis.), 64 N. W. Rep. 1026; Alabama, G. S. Ry. Co. v. Hill, 93 Ala. 514, 9 South. Rep. 722; People v. Bush, 68 Cal. 623.

[10] Hoffman v. State, 65 Wis. 46; Barczynski v. State (Wis.), 64 N. W. Rep. 1026; Baker v. State, 69 Wis. 41; Smith v. Nippert, 79 Wis. 130; see also Lathers v. Wyman, 76 Wis. 624.

[11] State v. Ussery (N. C.), 24 S. E. Rep. 414; State v. Gutekunst, 24 Kan. 252; Little Rock & Ft. Smith Ry. Co. v. Cavenesse, 48 Ark. 106, 132; Clark v. State, 28 Tex. App. 618; Brown v. Swineford, 44 Wis. 282; Baker v. State (Kan.), 44 Pac. Rep. 947; Goodwine v. Evans, 134 Ind. 262.

[12] State v. Taylor (Mo.), 35 S. W. Rep. 92; Norton v. State, 106 Ind. 163; Hopt v. Utah, 120 U. S. 430; Epps v. State, 103 Ind. 539; Western & Atl. Ry. Co. v. Ledbetter (Ga.), 25 S. E. Rep. 663; Brown v. Perez (Tex.), 34 S. W. Rep. 725; Vaughn v. State, 58 Ark. 353; Kirk v. State (Tex. Cr. App.) 37 S. W. Rep. 440; Nicks v. Chicago, St. Paul & K. C. Ry. Co., 84 Iowa, 27.

[13] Anderson v. State, 104 Ind. 167; Baker v. State, 69 Wis. 41; Lathrop v. Sinclair (Mich.), 68 N. W. Rep. 248; Santry v. State, 67 Wis. 67; Epps v. State, 103 Ind. 539; Barczynski v. State (Wis.), 64 N. W. Rep. 1027; Sunberg v. Babcock, 66 Iowa, 515; Hoffman v. State, 65 Wis. 46.

great disadvantage. And it may often be true that remarks in the opening speech would not be necessarily objectionable when, if made in the last argument, they might. Where a second argument is to follow, the person following has the right and privilege to answer any improper conduct of his adversary, and may be able to so use it as to make it bound back, like a boomerang, upon the party offending with telling effect. But when the objectionable conduct is in the closing speech, there is no such privilege available, and it becomes necessary to resort to the tactics incident to the preparation of a cause for appeal, and pave the way for a successful objection in a higher court.

Instances Where Reversals have Followed Improper Conduct.—It is error for the court to refuse leave of argument to a party where there is any evidence which might be legitimately argued in support of the contention of such party.[14] And in a criminal case where evidence was improperly admitted of other crimes committed by the accused, and the prosecuting counsel commented on the same over the objection of the defendant, and the court refused to instruct the jury to disregard the remarks, the case was reversed for this reason.[15] It is not good practice to permit counsel, in argument, to read from the law books to the jury. And when it is made to appear that, for this reason, the opposing side was prejudiced, it will be ground for reversal; otherwise not.[16] Persistent argument of counsel after objections and instructions by the court for the jury to disregard the improper remarks, is fatal on appeal.[17] Where a prosecuting attorney, in his closing argument, stated that "seven as good men as there were in the county had assisted in employing counsel to prosecute this cause," to which remarks proper exceptions were saved, the conduct was held error.[18] In a murder case where a district attorney used this language in his address to the jury, "The defendant was held on preliminary examination, as was shown by the evidence, and indicted by the grand jury. He has been tried twice in this court by a jury of twelve men. Forty men have tried this defendant on this charge and found him guilty." Under a statute providing that a former verdict could not be referred to either in the evidence or argument, it was held that this was error.[19] It is improper for an attorney, in the course of his address to the jury to refer to any facts within his own knowledge not legitimately in evidence.[20] Or, indeed, to any fact not in evidence whether within his knowledge or not.[21] Especially is this true where the line of argument based on facts not in evidence appeals naturally to the prejudices of the jury.[22] It is improper for counsel in argument to refer to the fact that the other party has taken a change of venue. This is a right he has under the law, and he should not be prejudiced in any way because he asserts it.[23] It is clearly error to insist on arguing evidence to the jury which has been excluded by the court.[24] It is error to comment on the fact that the opposing side has failed to call a witness when the party thus complaining could as well have introduced the testimony as the other.[25] In a personal injury case where the attorney for the plaintiff in his argument to the jury stated, "You ought to deal severely with these bloated corporations that can run their roads right through a man's house or yard," and the court, upon objection being made to such line of argument, refused to control same, and the verdict being for $20,000, the full amount sued for, it was held on appeal that the argument was improper and must have been prejudicial.[26] It is error for counsel for the State in a criminal case, over the ob-

[14] Douglas v. Hill, 29 Kan. 527; Houck v. Gue, 30 Neb. 113.

[15] Goldstein v. State (Tex. Cr. App.), 35 S. W. Rep. 289.

[16] Steffenson v. Chicago, Milwaukee & St. Paul Ry. Co., 48 Minn. 285.

[17] Heller v. People (Colo.), 43 Pac. Rep. 124.

[18] Clark v. State, 23 Tex. App. 618.

[19] State v. Clauser, 72 Iowa, 302.

[20] People v. Dane, 59 Mich. 550.

[21] Hall v. Wolf, 61 Iowa, 559; Ampherse v. Fleckenstein, 67 Mich. 247; Heard v. State, 24 Tex. App. 251; Bullard v. Boston & Maine R. R., 64 N. H. 27; Clark v. State, 23 Tex. App. 618; Donovan v. Richmond, 61 Mich. 467; Rickabus v. Gott, 51 Mich. 227; Burdick v. Haggart (Dak.), 22 N. W. Rep. 589; Van Alstine v. Kaniecki (Mich.), 67 N. W. Rep. 502; Young v. Pollak, 85 Ala. 439; Morris v. Maddox (Ga.), 25 S. E. Rep. 487; Holden v. Pennsylvania R. Co. (Pa.), 32 Atl. Rep. 103.

[22] Bremmer v. Green Bay, S. P. & N. Ry. Co., 61 Wis. 114; Porter v. Throop, 47 Mich. 313.

[23] Campbell v. Maher, 105 Ind. 383. See, also, Union Compress Co. v. Wolf (Ark.), 37 S. W. Rep. 877.

[24] Cleveland Paper Co. v. Banks, 15 Neb. 20.

[25] State v. Fitzgerald (Vt.), 34 Atl. Rep. 429.

[26] Galveston, H. & S. A. Railway Co. v. Cooper, 70 Tex. 67.

jection of the defendant and with the sanction of the court, to comment to the jury on the frequent occurrence of murder, the organization of vigilance committees and the acts of mobs, and argue that it is because of the lax manner in which the law is enforced.[27] So is the persistent argument of counsel on matters not in evidence over objections properly saved.[28] It is error to permit counsel to comment upon the affidavit of the opposite party for a continuance, and especially so when the court, upon objection being made, permits it, saying it is part of the record.[29] Also to state that "it is a part of the contract of every railroad man that he must swear for the road, or be discharged, in the absence of evidence of such fact."[30] It is the right of any party to except to improper remarks, and the courts should protect this right. And where objections were made to improper remarks of counsel, who thereupon said to the jury: "Gentlemen, you see the galled jade winces. They will do it every time you hit them." Upon exception being properly saved to such remarks made in reply to a proper objection, they were held fatal on appeal.[31] To comment on evidence excluded by the court is reversible.[32] And to allude to "Jay Gould and modern railroad economics," when there is no evidence to justify such allusion or reference.[33]

In an action against a railroad company for alleged burning of grass, counsel for plaintiff, *inter alia*, stated in his argument: "Gentlemen of the jury, the attorney for the railroad says you should consider this case as though this were a suit against a private citizen. Gentlemen, I want to show you why you should not do so. I want to show you that a railroad has rights that you don't have. The railroad can condemn your graveyards, and disturb the resting place of your sacred dead. Can you do that?" It is difficult to see how a court of justice could allow such a course of argument over objection, but this seems to have been done. It was, however, at the expense of a reversal of the judgment on appeal by the aggrieved party.[34] This case should have been considered by the jury on the broad and just plane contended for, because to admit any other contention is a simple denial of a just, fair and impartial trial, the necessity for, and the force of, which, the court seem to have keenly felt. That a railroad company is invested with the right of eminent domain is no reason why they should not have the same impartial consideration of their claims in courts of justice that others have for while they have this extraordinary right, they have corresponding burdens which, the private citizen does not bear.

Instances Where Remarks Have Been Held not Reversible. In a murder trial where the prosecuting attorney stated to the jury that "no innocent man was ever yet hung; and if the jury wrongfully convicted the defendant, he had a right to appeal to the supreme court, who would rectify the wrong," though improper, was held not prejudicial because the first part was merely the opinion of the counsel, and the second only matter of common knowledge.[35] Nor is it reversible for the prosecuting attorney to state to the jury that he is acting without any pay and merely from a sense of duty, though objected to at the time, and passed by the court without criticism.[36] It is not fatal for the prosecuting counsel to reflect in his argument on defendant's counsel, where the conduct is rebuked at the time by the court.[37] And where a prosecuting attorney referred in his argument to the fact that the accused had not testified in his own behalf, but upon objection, immediately desisted, and the jury were cautioned by the court that the silence of the accused could in no case be considered to his

[27] Ferguson v. State, 49 Ind. 33.

[28] Martin v. Orndorf, 22 Iowa, 504; Tucker v. Henniker, 41 N. H. 317; Randall v. Evening News Assn., 97 Mich. 136.

[29] Louisville, N. O. & T. Ry. Co. v. Van Eaton (Miss.), 14 South. Rep. 267.

[30] Missouri, Kansas & T. Ry. Co. v. Woods (Tex. Civ. App.), 25 S. W. Rep. 741.

[31] Western Union Tel. Co. v. Wingate, 6 Tex. Civ. App. 394.

[32] Haynes v. Trenton, 108 Mo. 123.

[33] Williams v. St. Louis & San Francisco Ry. Co., 123 Mo. 573.

[34] Gulf, C. & S. F. Ry. Co. v. Scott, 7 Tex. Civ. App. 619. Say the court in disposing of this case on this question, "when damage suits against railroad companies are tried with entire fairness, results are generally as favorable to plaintiffs as they are entitled to have them. Therefore, and because all litigants are entitled to fair trials, it is the duty of courts to see that railroad companies, when before them as litigants, are not treated with manifest unfairness; and, in discharge of this duty, this court will reverse the judgment in this cause."

[35] Vaughn v. State, 58 Ark. 353.

[36] State v. Taylor (Mo.), 35 S. W. Rep. 92.

[37] State v. Taylor, 35 S. W. Rep. 92.

prejudice, it was held not prejudicial.[38] On a trial for rape, the prosecuting attorney referred to the defendant as a "dirty dog." On appeal this, though held reprehensible in counsel, yet was not ground for reversal.[39] In a case where the county attorney addressing the jury used this language: "Defendant has been guilty of one penitentiary offense, and would commit a greater offense to cover the other up," but it was not made to appear in the appellate court with what reference the statement was made, nor whether the attorney had reference to the offense on trial, and as no objection was made, it was held not to be ground for reversal.[40] On a trial for burglary, the prosecuting attorney stated that "defendant was no boy; was no spring chicken; had served a term in the State prison at Frankfort," but he withdrew the remarks when objection was made and sustained by the court. It was held that there was no reversible error.[41] Where in the closing argument the counsel for the prosecution alluded to the case on trial as one of extraordinary importance, and to the "many times it had been brought before the tribunals" which course of argument, upon objection by defendant was withdrawn, and the jury were instructed by the court that the case was to be tried on the evidence, and that they were not to consider it with respect to any previous trial, no cause for reversal is shown, though by statute it is provided that "the granting of a new trial places the parties in the same position as if no trial had been had" and that "all testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument."[42] It is not reversible error for the county attorney, in his opening statemeut to the jury to state that he would show defendant to be guilty of other crimes than the one charged, though he fails to make such proof, no objections being made to the statement, nor affirmative showing of prejudice because thereof.[43] It is not improper for counsel to comment on the fact that the opposite side had failed to call important witnesses who are shown to be accessible.[44] In a murder case where the prosecuting counsel, replying to the argument of his adversary sustaining the good character of the accused, stigmatizes him as a thief and a forger, the evidence tending to prove as much, it is not error.[45] And where counsel makes an improper statement, and it is objected to, and he thereupon explains that it is only his individual theory, and admits that there is no evidence to support it, no prejudice will be presumed to arise.[46] In a personal injury case, plaintiff's counsel in his opening statement told the jury that it depended on their verdict "whether this widow and orphan children go out of this court room penniless, fatherless and to the poor house." These remarks were discussed by defendant's counsel in his argument, and the jury were told to ignore them. The verdict was moderate, and it was held that no error had been shown.[47] A mere statement of a lawyer in a case that he believes the witnesses on the opposite side are a set of liars, is not error. At best it is nothing more than the private opinion of counsel.[48] Nor is the expression of the prosecuting attorney that he believes defendant guilty, cause for reversal, where the jury are instructed not to consider it.[49] In a recent Texas case the question of the validity of a verdict had where the speech of the prosecuting attorney to the jury was applauded by the bystanders, was raised. The court made a kind of straddle of the direct question but

[38] Petite v. People, 8 Colo. 518; Hopt v. Utah, 120 U. S. 430. Contrary to this holding, however, it is held in Kansas that where the prosecuting attorney alluded to the fact that the defendant had not testiged in his own behalf, that the accused, for this reason, was entitled to a new trial, notwithstanding the court expressly instructed the jury to disregard such remarks. State v. Balch, 31 Kan. 465. It is often very difficult in the course of an interesting trial for counsel on either side to confine themselves rigidly to the very letter of the record at all times; and the better rule would seem to be that when such departures are made, a rebuke from the court, coupled with a positive instruction to the jury not to consider the objectionable remarks in any way, would be ample caution in guarding against prejudicial effects. It is very rarely indeed that the ends of justice would require a reversal of a case when this has been done.

[39] Anderson v. State, 104 Ind. 467.

[40] State v. McCool, 34 Kan. 613.

[41] Anderson v. Commonwealth (N. Y.), 35 S. W. Rep. 542.

[42] Hopt v. Utah, 120 U. S. 430.

[43] State v. McCool, 34 Kan. 613.

[44] Gavigan v. Scott, 51 Mich. 373.

[45] State v. Brooks, 92 Ma. 542; State v. Winter, 72 Iowa, 627; Delaney v. Commonwealth (Ky.), 35 S. W. Rep. 1037; Washington v. State (Tex. Cr. App.), 32 S. W. Rep. 693.

[46] Hinton v. Cream City Ry. Co., 65 Wis. 323.

[47] Gulf, Colorado & Santa Fe Ry. Co. v. Duvall (Tex. Civ. App), 35 S. W. Rep. 699; Provost v. Brunock (Mich.), 67 N. W. Rep. 1114.

[48] People v. Wirth (Mich.), 66 N. W. Rep. 41.

[49] People v. Pope (Mich.), 66 N. W. Rep. 213.

intimated that, if the applause was such as appeared to have had an adverse effect with the jury, the verdict should have been set aside. This would seem to leave the question after all to the discretion of the trial judge, which is perhaps the most satisfactory conclusion, as the State's attorney could not be to blame for an outburst of applause by the bystanders prompted by the argument which is in every way legitimate.[50] An attorney may say in his opening statement what the substance of the evidence he expects to adduce is, if in good faith, and believing the evidence is proper, though it is rejected by the court when offered.[51] And counsel may argue as facts that which the evidence tends to prove though in point of fact it is not sufficient to establish the facts contended for.[52] The object and aim of the law in its strictness relating to the argument of attorneys is to prevent a possible injustice at the hands of the jury which might be prompted by such remarks. There can rarely, if ever, be a case where improper argument in a case tried to the court without a jury would be ground of reversal. This contention is analogous to the principle that it is not reversible error to admit improper or incompetent evidence when the court tries a case without a jury, for the court is presumed to know the law—this is sometimes said to be a violent presumption—and the appellate court will indulge the presumption that the court considered the case upon that evidence, only which was competent and admissible.[53] And for the same reason, it certainly would be presumed on appeal, that the trial judge was moved only by such line of argument as was legitimate upon the whole case.

W. C. RODGERS.

Nashville, Ark.

[50] Jackson v. State (Tex. Cr. App.), 37 S. W. Rep. 431.

[51] State v. Allen (Iowa), 69 N. W. Rep. 274.

[52] Geiger v. Payne (Iowa), 69 N. W. Rep. 554.

[53] Haley v. Johnson (Tex. Civ. App.), 28 S. W. Rep. 382; Brown v. Lazarus, 5 Tex. Civ. App. 81; Smith v. Lee, 82 Tex. 130; San Antonio Street Ry. Co. v. Muth, 7 Tex. Civ. App. 443; Sharmer v. Johnson, 43 Neb. 509; Whipple v. Fowler, 41 Neb. 675; Stabler v. Gund, 35 Neb. 651; Ward v. Parlin, 30 Neb. 376; Willard v. Foster, 24 Neb. 213; Richardson v. Doty, 25 Neb. 424; Enyeart v. Davis, 17 Neb. 228.

TRIAL—JURORS—COMPETENCY.

WOODS v. STATE.

Supreme Court of Tennessee, June 9, 1897.

An opinion by a juror in a criminal case, formed solely from reading a detailed account in a newspaper, does not disqualify him, where the account did not purport to be made by those who professed to know the facts, and he states that he is without prejudice, and can render a fair and impartial verdict on the law and evidence.

CALDWELL, J.: William A. Woods was indicted in the criminal court of Shelby county for the murder of Samuel Hughes. He was tried and convicted of murder in the second degree, and his punishment was assessed at 15 years in the State prison. The case is brought into this court by an appeal in the nature of a writ of error. That the deceased, Samuel Hughes, was mortally wounded and killed by the defendant, William A. Woods, is a conceded fact. Hughes was clerk and bartender for E. B. Ford, who was doing business in the city of Memphis. Woods was engaged in business near by. Between 8 and 9 o'clock on the night of March 23, 1894, Woods walked into Ford's store, and challenged him for a game of cards. Ford declined the challenge, but Hughes accepted it. Thereupon the game was commenced across the bar, Woods being in front, and Hughes in the rear. After a while the playing ceased, and a dispute arose about the winnings. Hughes insisted that he was two games ahead, and that Woods owed him two dollars. Woods denied this, and contended that he was only one game behind, and owed Hughes but one dollar. Both parties grew angry and abusive. Hughes leaped over the bar or counter, and a fight ensued, without weapons, and without serious injury to either of the combatants. After the rencounter was over, Woods withdrew from the store of Ford, but soon returned, and delivered a deadly charge from a shotgun into the head and face of Hughes, causing death almost instantaneously. Woods testified that he took the gun into the store when he first went there, and that upon his return he took it up, and fired to prevent Hughes from shooting him with a pistol, and that the gun and pistol were discharged simultaneously; yet the great preponderance of the testimony is in favor of the theory that the defendant went away to arm himself, and that he soon returned with his gun in hand, and discharged it upon his victim, when in no danger himself. The verdict is amply sustained by the evidence.

It is contended that the record discloses several errors of law, on account of which a new trial should be granted. It is said that the trial judge made an erroneous ruling as to the competency of E. W. Epperson, who was presented as a juror. When examined on his *voir dire*, Epperson said that he had "read a detailed account of the killing" in the newspapers; that he accepted what he read as true, and from it formed an opinion as

to the guilt or innocence of the accused; but that the account he read did not mention any witnesses, report any evidence, or refer to the coroner's inquest; and that he had no information about the homicide, except what he had read in the newspapers; and, finally, that he was without bias or prejudice as to the defendant, and thought he could render a fair and impartial verdict solely on the law and the evidence, if he should become a juror in the case. The defendant, by his counsel, challenged the proposed juror on account of his opinion. The court ruled that he was competent, and the defendant thereupon challenged him peremptorily, and he was excused. The defendant exhausted his other 23 peremptory challenges, and after that peremptorily challenged another person, who was accepted by the court over the defendant's objection. Thus, the defendant was compelled to take a juror whom he did not want, and whom he would have been able to avoid had he not been forced to spend one of his 24 peremptory challenges upon Epperson, whom he first challenged for cause, and whom he now insists was incompetent. Article 6 of the amendments to the constitution of the United States, and section 9 of article 1 of the constitution of this State, declare affirmatively that the accused in every criminal prosecution shall enjoy the right of trial by an "impartial jury," and by that declaration impliedly, prohibit the trial of such person by a partial jury. An impartial jury is one composed of 12 impartial men. The presence of one partial man on a jury destroys the impartiality of the body, and renders it partial. Ellis v. State, 92 Tenn. 100, 20 S. W. Rep. 500. Any disqualification which makes one member partial brings the jury, as such, within the prohibition of the fundamental law, impairs one of the highest and most sacred rights of the accused, and vitiates any verdict in which the partial member may participate. A man who has prejudged the case upon its real facts is necessarily partial, and therefore incompetent to sit as a juror at the trial. An opinion as to the guilt or innocence of the accused, however, is not always a disqualification. Some opinions are disqualifying, and others are not; the difference in effect being due to the difference in character and origin. Those opinions which are based upon personal knowledge of the facts of the case, or upon a statement of the facts made by the witnesses themselves, or by others who have heard the witnesses relate them, disqualify; but those formed from rumor do not disqualify. Rice v. State, 1 Yerg. 432; McGowan v. State, 9 Yerg. 184; Payne v. State, 3 Humph. 376; Moses v. State, 10 Humph. 456; Moses v. State, 11 Humph. 232; Alfred v. State, 2 Swan, 581; Eason v. State, 6 Baxt. 466; Conatser v. State, 12 Lea, 436; Spence v. State, 15 Lea, 539. In Eason's Case 10 persons summoned as jurors stated that they "had formed and expressed an opinion as to the guilt or innocence of the defendant," from the reading of a newspaper, which "purported to give an account of the facts of the case, but did not purport to give the testimony in the case; and that if accepted and sworn as jurors in this case, they believed they could give a fair and impartial verdict on the law and the testimony." The trial judge pronounced those persons competent as jurors, and the defendant challenged them peremptorily. On appeal in error, this court reversed the ruling of the trial judge, and declared the enactment (chapter 51, Acts 1870-71) on which it was based null and void, because in contravention of the constitutional right of trial by an impartial jury. 4 Baxt. 467, 477, 478. In Conatser's Case it was said that the newspaper account referred to in the Eason Case was treated "as falling within the disqualifying sources of information, probably because detailed by those who professed to know the facts," and that "whether this assumption and the adjudication that the act of the legislature was unconstitutional are correct are questions not now before us." 12 Lea, 442, 443. The latter suggestion has been regarded as raising some doubt as to the correctness of the decision in Eason's Case. The Spence Case lays down the following rule: "Newspaper statements, to disqualify a juror, must be such as fall within the disqualifying sources of information, and purport to be detailed by those who profess to know the facts. Any other statement would only amount to rumor, whether in parol or printed." 15 Lea, 546.

Tested by this rule, Epperson was, undoubtedly, competent. His information was not derived from any one of the "disqualifying sources." He had no personal knowledge of the facts, had heard no statement of the facts by the witnesses, nor by those to whom the witnesses had related them, nor did the "detailed account of the killing" which he read in the newspapers purport to be made "by those who professed to know the facts." The account he read amounted to rumor only, and it was none the less rumor because circulated by newspapers, and not by oral deliverances. It follows that the opinion entertained by the proposed juror was based on rumor, and that he was therefore not disqualified by reason of that opinion. Nothing is better settled in criminal procedure in this State than that rumor is not a source of disqualification.

Objections are urged against the ruling of the court below as to other jurors, as to the admission and rejection of testimony, as to affidavits and motion for a new trial; but of those objections more need not be said in this opinion than that none of them are well taken, and that the rulings complained of were correctly made. Affirm the judgment.

NOTE.—Lord Mansfield said, that a juror should be as white paper. He should know neither plaintiff nor defendant. He should be superior even to a suspicion of partiality. Mylock v. Saladine, 1 W. Bl. 480. It has been asserted that at common law a person was not incompetent to be a juror because he had formed or expressed an opinion on the matter at issue (U. S. v. Schneider, 21 D. C. 381); but the opposite view was

early and generally adopted both in England and in this country. Coughlin v. State, 144 Ill. 140; U. S. v. Barber, 21 D. C. 456; U. S. v. Schneider, 21 D. C. 381. Owing to the rapid diffusion of news at the present time by the railroads, the newspapers and the telegraph, it was found necessary to abandon this rule; otherwise in the case of atrocious crimes, or others, which excited the interest of the public generally, it would be almost impossible to secure a jury, while the intelligent would be excluded as jurors. Baker v. State, 88 Wis. 140; U. S. v. Barber, 21 D. C. 456. Some courts still hold, that one who has formed an opinion as to the guilt or innocence of the accused, even though based on rumor, which would require evidence for its removal, is incompetent as a juror. Vance v. State, 56 Ark. 402; People v. Shufelt, 61 Mich. 237; State v. Rutter, 13 Wash. 203. A mere impression was not considered to be an opinion. State v. Murphy, 9 Wash. 204. When such opinion is unqualified or unconditional, or of a fixed and positive nature, no matter from what source derived, all courts exclude the holder thereof from the jury box. Basye v. State, 45 Neb. 261; State v. Snodgrass, 52 Kan. 174; Washington v. Com., 86 Va. 405; Haugen v. Chicago, etc. R. R., 3 S. Dak. 394; Trial of Aaron Burr, vol. 1, p. 416; Hinkle v. State, 94 Ga. 595; Oliver v. State, 34 Fla. 203; People v. Thacker (Mich., 1896), 66 N. W. Rep. 562; Coughlin v. State, 144 Ill. 140. Where, however, such opinions are based on rumors or hearsay, and are not positive or fixed, and will readily yield to evidence, the courts generally consider them not to be a disqualification for jury service. Hinkle v. State, 94 Ga. 595; Trial of Aaron Burr, *supra;* People v. O'Neill (Mich. Dec. 1895), 65 N. W. Rep. 540; U. S. v. Barber, 21 D. C. 456; State v. Kelly, 28 Oreg. 225; Trotter v. State (Tex. Cr. App. 1896), 36 S. W. Rep. 278; Adams v. State (Tex. Cr. App. 1895), 33 S. W. Rep. 354; People v. Collins, 105 Cal. 504; State v. De Graff, 113 N. C. 688; Com. v. Crosswise, 156 Pa. St. 304; State v. Punshon, 133 Mo. 44. Where such opinion is based on newspaper accounts or upon conversations, which the party believes to be true, it works a disqualification. State v. Wilcox, 11 Wash. 215; State v. Murphy, 9 Wash. 204. The possession of an opinion on the guilt or innocence of the accused, *prima facie* disqualifies its holder from service on the jury, and the burden is on the State to show that it is not a disqualification (Vance v. State, 56 Ark. 402): any doubt on the subject should be solved in favor of the defendant. Washington v. Com., 86 Va. 405. One who has heard or read the evidence in a case is incompetent to serve as a juror therein. State v. Taylor, 134 Mo. 109; Wade v. State (Tex. Crim. App. 1895), 32 S. W. Rep. 772.

Statutes.—Many States have passed statutes relative to the subject under discussion. In many States it is left to the court to decide after an examination of the party, whether his opinion, formed from newspaper reports or from hearsay, is of such a nature as to disqualify him from jury service. State v. Duffy, 124 Mo. 1; Basye v. State, 45 Neb. 261; Coughlin v. State, 144 Ill. 140; People v. Wells, 100 Cal. 227; People v. Thiede, 11 Utah, 241; Hopt v. Utah, 120 U. S. 430; Green v. State, 72 Miss. 522; Lewis v. State, 137 Ind. 344; State v. Tom, 8 Oreg. 177; State v. Field, 89 Iowa, 34; State v. Foster, 91 Iowa, 164; State v. Cunningham, 100 Mo. 382. Some statutes disqualify parties who have formed an opinion on the subject from conversations with witnesses of the transactions, or from reading reports of their testimony or from hearing them testify. Basye v. State, 45 Neb. 261, 1895; Trotter v. State (Tex. Crim. App. 1896), 36 S. W. Rep. 278. Where the statute provided that a party, who had formed or expressed an opinion on the issue or any material fact to be tried, was incompetent to be a juror, it was held, that impressions or opinions, not of a fixed and positive character, do not disqualify, if such person appears free from bias or prejudice and has a mind open to a fair consideration of the evidence. State v. Treadwell, 54 Kan. 507, 513. In South Carolina the action of the trial court in accepting a juror seems not to be reviewable in the appellate court. State v. McIntosh, 39 S. C. 97; State v. Merriman, 34 S. C. 16. Where there are statutes reposing such discretion in trial courts, their decisions as to the competency or incompetency of jurors will never be reversed unless they are plainly wrong (State v. Church, 6 S. Dak. 89; Lewis v. State, 137 Ind. 344; Haugen v. Chicago, etc. R. R., 3 S. Dak. 394; Baker v. State, 88 Wis. 140; Howell v. State, 4 Ind. App. 148; Com. v. Crosswise, 156 Pa. St. 304; Gavlitz v. State, 71 Md. 293), and all doubts will be resolved in favor of the finding of the trial court. State v. Cunningham, 100 Mo. 382. A juror was accepted, who has formed an opinion on the case, had read an account of the facts, and had received from the father of the deceased a narrative of the circumstances. The appellate court considered such action to be an extreme application of the discretion allowed a trial court, yet refused to order a reversal on that ground alone. Goins v. State, 4 Ohio St. 457.

Constitutionality of Statutes. — Such statutes have been assailed as invading the constitutional guarantees of a fair and impartial trial, and that no person shall be deprived of life or liberty without due process of law. These laws have been upheld as prescribing the mode for obtaining impartial juries and as not taking away any rights. Green v. State, 72 Miss. 522; Spies v. People, 122 Ill. 261; Spies v. Ill., 123 U. S. 131, 170. Where such a statute was held to be unconstitutional, it was claimed that such decision was due to the fact that the law did not provide that the court should be satisfied as to the facts before the party could be accepted as a juror. Coughlin v. State, 144 Ill. 140. It was considered that such statutes were intended for cases where it is almost impossible to secure juries, and should only then be used. State v. Church, 6 S. Dak. 89.

S. S. MERRILL.

St. Louis, Mo.

HUMORS OF THE LAW.

He had just been sentenced to thirty days for stealing and eating two apples. "Fifteen days," said one of the bystanders in the court room, "for stealing an apple? That's a high price."

"That's nothing," said another, "Adam took only one and was condemned to hard labor for life."

"I haven't any case," said the client, "but I have money."

"How much?" asked the lawyer.

"Fifty thousand dollars," was the reply.

"Phew! you have the best case I ever heard of. I'll see that you'll never go to prison with that sum," said the lawyer, cheerfully. And he didn't—he went without a dollar.

Smith—"Is young Flywedge practicing law?"

William—"I think not. He was called to the bar, but I think he is practicing economy."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADMIRALTY—Shipping — Treatment of Passengers. —Passengers who come aboard a vessel mainly engaged in the carriage of freight, after the cabin room is all taken, and who for two days, while loading is going on, make no claim to cabin accommodations or for bedding, are to be considered as impliedly agreeing that their ship room and quarters are to be on deck, and that such accommodations are to be deemed reasonable.—DEFRIER V. THE NICARAGUA, U. S. D. C., S. D. (Ala.), 81 Fed. Rep. 745.

2. ASSAULT—Justification—Evidence.—The use of opprobrious words or abusive language does not necessarily, and at all events, justify the person to whom they are addressed in beating the person using the same. In every such instance the jury are to determine, in view of "the nature and extent of the battery," whether or not the accused was justified by the provocation given.—MOORE V. STATE, Ga., 27 S. E. Rep. 675.

3. ASSUMPSIT—Promise—Pleading.—In *assumpsit* on a fire insurance policy the declaration set forth the policy, showing a contract by which the loss was "to be paid sixty days after proof" thereof: Held that, on general demurrer, this was a sufficient allegation of the promise to pay.—POWERS V. NEW ENGLAND FIRE INS. CO., Vt., 38 Atl. Rep. 148.

4. BILLS AND NOTES—Interest.—A promissory note payable on a certain time after date, with interest at the rate of 9 per cent. until paid, carries interest at that rate after the maturity of the note as well as before.—AUGUSTA NAT. BANK V. HEWINS, Me., 38 Atl. Rep. 156.

5. BILLS AND NOTES — Promissory Note — Failure of Consideration.—The maker of a promissory note given in payment for stock in a national bank, and immediately transferred by indorsement to said bank by the payee, cannot resist payment of the note, in the hands of a receiver of the bank, on a plea of failure of consideration because of the insolvency of the bank, where the payee has fully indemnified him against loss.—HETTINGER V. MEYERS, U. S. C. C., D. (Kan.), 81 Fed. Rep. 805.

6. CONSTITUTIONAL LAW — Self-incriminating Testimony—Waiver.—If one, fully cognizant of his constitutional right to remain silent in respect to matters tending to incriminate himself, abandons it, whether under compulsion or otherwise, and essays to speak under oath, he must speak the truth, and may be prosecuted for perjury if he does not; but, before this principle can be invoked, it must appear that the witness' abandonment of his rights was knowingly and understandingly made, and that no undue advantage has been taken of an ignorant witness in the course of an inquisitorial examination.—UNITED STATES V. BELL, U. S. C. C., W. D. (Tenn.), 81 Fed. Rep. 830.

7. CONTRACT — Abandonment — Recovery.—Plaintiff contracted to erect a building for defendant, to be completed by August 1, 1894, and he performed labor thereon until October 28, 1894, when he voluntarily abandoned work. All the services and materials were furnished in fulfillment of the contract, apart from which no agreement for service or materials were made. Plaintiff lost his right to a lien on the premises by failure to comply with the statutory requirements; Held, that plaintiff, by voluntary abandonment of the contract, lost his right to recover the value of his services and the material used.—MARCHANT V. HAYES, Cal., 49 Pac. Rep. 840.

8. CONTRACTS—Consideration.—A nephew who made a trip at his uncle's request, could not recover the expenses thereof from the uncle's estate, in view of the confidential relations that had existed between them, where there was no agreement by the uncle to pay such expenses.—MULDRICK V. GALBRAITH, Oreg., 49 Pac. Rep. 886.

9. CORPORATION—Foreign Corporations — Service of Process.—A foreign corporation doing business in Oregon is subject to its laws, and hence, as there is no special law relative to service upon it, a service upon its president is *prima facie* sufficient, though the return does not show he was authorized to represent the corporation, in view of the statutes providing for such service upon domestic corporations.—FARREL V. OREGON GOLD MIN. CO., Oreg., 49 Pac. Rep. 876.

10. COUNTY BONDS — Constitutional Requirement.— The provision of Const. Tex. art. 11, § 7, that "no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund," applies to all cities and counties, and is not restricted to counties and cities bordering on the Gulf coast, which, by the preceding sentence of that section, are authorized to levy and collect a tax for the construction of sea walls, breakwaters, or other sanitary purposes, and to create a debt therefor, and issue bonds in evidence thereof.—WADE V. TRAVIS COUNTY, TEX., U. S. C. C. of App., Fifth Circuit, 81 Fed. Rep. 742.

11. CREDITORS' BILL — Lien of Garnishment.—The remedy by creditors' bill is not superseded by garnishee process and proceedings supplementary to judgment.—MATLOCK V. BABB, Oreg., 49 Pac. Rep. 873.

12. CREDITORS' SUITS — Equity Jurisdiction.—The right to prosecute in a court of equity a creditors' bill, to uncover assets fraudulently conveyed, and to compel an accounting, was not superseded by the garnishment and attachment laws, since a legislative intention that it should be so superseded does not appear, and in the absence of such intent the jurisdiction of equity is not abrogated by the creation of a new legal remedy.—SABIN V. ANDERSON, Oreg., 49 Pac. Rep. 870.

13. CRIMINAL EVIDENCE — Dying Declarations.—Defendant and W were brought into the presence of deceased, then *in extremis*, and about to make a dying declaration to the district attorney. W spoke to deceased in Chinese, and the district attorney asked deceased what W said, and he answered, "You better not tell him:" Held, that the answer formed no part of the dying declaration.—PEOPLE V. WONG CHUEY, Cal., 49 Pac. Rep. 833.

14. CRIMINAL LAW—Argument of Counsel.—Where a defendant in a criminal case testifies as a witness therein on his own behalf, and his testimony conflicts with that of a witness for the prosecution, it is not improper for the prosecuting attorney in his closing argument to the jury to remark that: "The State's witness is entirely disinterested, but that is not the case with the defendant. He stands here charged with crime, and it is his interest to screen himself."—MALOY V. STATE, Fla., 22 South. Rep. 719.

15. CRIMINAL LAW — Assault with Intent to Rape.—In proof of an assault with intent to rape, the mother of prosecutrix may testify as to her manner and appearance, and the condition of her person, shortly after the

alleged assault, and to the fact that she made a disclosure.—STATE v. SARGENT, Oreg., 49 Pac. Rep 899.

16. CRIMINAL LAW — Bawdyhouse — Evidence.—General reputation of the house as a house of prostitution is not competent or sufficient to sustain a conviction. The prosecution is not required to show particular acts of lewdness or prostitution in the house. It is competent for the prosecution to show that the house is resorted to by people of both sexes who are reputed to be of lewd and lascivious character. From evidence of the general reputation of the inmates and persons who resort thereto, as being of lewd and lascivious character, the law will infer that such characters resort thereto for lewd and immoral purposes, and that the house is a bawdyhouse.—NELSON v. TERRITORY, Okla., 49 Pac. Rep. 920.

17. CRIMINAL LAW—Homicide.—In a trial for murder, an instruction that "in determining as to whether defendant is guilty of the offense charged" the jury must consider the facts and circumstances detailed in evidence from defendant's standpoint, as they reasonably appeared to him at the time, and not from any other standpoint, was properly refused, as it is only where the homicide is justified on the ground of self defense, and where defendant is to judge as to the danger in which he is placed at the time, that the facts and circumstances which constitute the danger are to be viewed from defendant's standpoint.—WATKINS v. UNITED STATES, I. T., 41 S. W. Rep. 1044.

18. CRIMINAL PRACTICE — Gaming and Gambling House.—Where a statute fully defines the offense that it creates, it is ordinarily sufficient for an indictment to charge the defendant with all the acts within the statutory definition, substantially in the words of the statute, without further expansion. Section 2644 of the Revised Statutes, prohibiting the keeping of a table, room, house, or other place for the purpose of gaming or gambling, held to fall within this rule, and to so define the offense that it creates as that an indictment charging such offense substantially in its language will be sufficient.—MCBRIDE v. STATE, Fla., 22 South. Rep. 711.

19. EVIDENCE—Incompetent Employee—Evidence of Reputation.—In an action against a railroad company for injuries received in a collision caused by the gross negligence of a telegraph operator, after the plaintiff has introduced evidence tending to show that the operator was not a fit man for the place, evidence offered by the defendant that the general reputation of the operator as a telegraph operator was good is admissible.—BALTIMORE & O. R. CO. v. CAMP, U. S. C. C. of App., Sixth Circuit, 81 Fed. Rep. 807.

20. EVIDENCE — Photograph.—A photograph, like a plan or other picture, if its correctness be proved, may be used in a trial before a jury to illustrate the evidence in the case.—STATE v. HERSOM, Me., 38 Atl. Rep. 160.

21. FEDERAL COURTS — Jurisdiction—Ancillary Proceeding.—A bill in equity filed in the circuit court against the parties to an action at law, which has proceeded to judgment in said court, to enjoin the enforcement of such judgment, and for permission to the complainant to intervene in said action and set up a defense, is ancillary to the original action, so far as the question of jurisdiction is concerned, and may be maintained without regard to diversity of citizenship.—MCDONALD v. SELIGMAN, U. S. C. C., N. D. (Cal.), 81 Fed. Rep. 753.

22. FRAUDULENT CONVEYANCE — Voluntary Conveyances.—Neither a grantor nor his heirs can impeach a conveyance as voluntary unless at the time the conveyance was executed the grantor was in such a state of mental weakness as to be incapable of fully understanding the nature and effect of the transaction.—CARNAGIE v. DIVEN, Oreg., 49 Pac. Rep. 891.

23. GIFTS—Conditions—Delivery.—A person about to undergo a surgical operation, the result of which was uncertain, transferred all her property to defendant, the real estate being conveyed by deed in due form, and the personal property, consisting of furniture, notes, clothing, etc., being transferred by a bill of sale, but no physical change in possession taking place. The intention was that the property should be used for the donor's benefit, and remain in her possession during her life, and in the event of her death from the operation, defendant was to distribute it according to the directions of an unsigned written memorandum: Held, the donor having retained possession, and the right to expend as much of the personalty as she might need during her life, that the transaction was void as a gift.—KNIGHT v. TRIPP, Cal., 49 Pac. Rep. 838.

24. HOMESTEAD— Mortgage Prior to Patent.—Notwithstanding the provisions of section 4 of the homestead act (12 Stat. 393), a mortgage executed upon land after the homestead entry man has made final proof and received final certificate therefor is valid, and such mortgage may be enforced by foreclosure and sale of the land.—FARISS v. DEMING INV. CO., Okla., 49 Pac. Rep. 926.

25. HUSBAND AND WIFE—Support.—Since equity has jurisdiction to decree alimony to a wife, though no divorce is sought, it has jurisdiction also when the husband applies for support from the wife, in view of the fact that Civ. Code, §§ 155, 176, provide that husband and wife contract towards each other "obligations of mutual support," and that the wife must support the husband if he is rendered unable to do so by infirmity. — LIVINGSTON v. SUPERIOR COURT OF LOS ANGELES COUNTY, Cal., 49 Pac. Rep. 836.

25. HUSBAND AND WIFE — Transfers — Fraud.—The wife of the owner of real and personal property valued at several thousand dollars testified that she had helped to earn the property, which was in her husband's name, and that in the spring or fall of 1892 they entered into an agreement to divide the property, she to take the personalty, and he the land. No written transfer was made, nor was there any delivery of possession; and the husband continued to manage the personalty, paying taxes thereon, and disposing of portions of it, without accounting to the wife: Held, the husband having testified flatly to the contrary, that the wife's testimony was insufficient to show a sale or transfer.—PERKINS v. MCCULLOUGH, Oreg., 49 Pac. Rep. 862.

27. INJUNCTION BY TAXPAYER.—A taxpayer, though entitled to maintain suit in his own name to enjoin misapplication of funds of a municipal corporation, cannot likewise sue to recover its funds already misappropriated.—BROWNFIELD v. HOUSER, Oreg., 49 Pac. Rep. 844.

28. INJUNCTION—Violation—Contempt.—One who is a party to a decree enjoining him from diverting certain water is guilty of contempt if his tenant, by his direction, perform acts of diversion.—STATE v. LAVERY, Oreg., 49 Pac. Rep. 852.

29. INSURANCE—Incumbrances.—Although a fire insurance policy contains a clause avoiding the policy if the subject of the insurance be or become incumbered by mortgage, yet, if it is issued with knowledge by the company of an existing incumbrance on the property, a new incumbrance, made for the purpose of discharging the existing one, will not avoid the policy.—KOSHLAND v. HOME MUT. INS. CO., Oreg., 49 Pac. Rep. 864.

30. INSURANCE—Incumbrances.—A condition rendering an insurance policy void by an increase of the hazard is not violated by giving a mortgage in order to discharge incumbrances on the property of which the insurer had knowledge when the insurance was effected.—KOSHLAND v. FIRE ASSN. OF PHILADELPHIA, Oreg., 40 Pac. Rep. 865.

31. INSURANCE—Misrepresentation and Concealment.—The failure of insured to disclose in his application the existence of incumbrances on the property, if not asked as to incumbrances by the agent of the company who filled out the application, will not avoid the

policy, although it provides that concealment or misrepresentation of any material fact will avoid the policy, and also that, if the interest of insured in the property is not truly stated therein, the policy shall be void.—KOSHLAND v. HARTFORD FIRE INS. CO., Oreg., 49 Pac. Rep. 866.

33. INTERVENTION.—Persons seeking to establish an equitable lien over funds sought to be distributed in a cause may intervene therein.—EX PARTE KENMORE SHOE CO., S. Car., 27 S. E. Rep. 682.

34. JUSTICES' COURTS—Right of Appeal.—A garnishee may appeal from a judgment rendered against him in a justice's court, under Hill's Ann. Laws, § 2117, providing that "either party may appeal from a judgment given in a justice's court," and section 152 and sections 168 170, providing that a plaintiff may obtain a personal judgment against a garnishee.—BURNS v. PAYNE, Oreg., 49 Pac. Rep. 884.

35. LIBEL — Newspaper Articles as Evidence.—In a suit for libel, an article published in a widely-circulated newspaper, containing a statement of facts upon which the defendant subsequently predicates the libelous publication, if shown to have been seen, read, and believed to be true by the defendant, is proper to be admitted in evidence, not in rebuttal of the plaintiff's evidence disproving the truth of such newspaper article, nor as affirmative evidence of the truth of the statements therein made, but only in mitigation of damages, for the purpose of showing that the libelous words were used upon probable grounds of suspicion calculated at the time to impress the belief of their truth, and that they were not published with the malicious purpose of falsely and wantonly destroying character.—HOBY v. FLETCHER, Fla., 22 South. Rep. 716.

36. MANDAMUS—License—Board of Health.—*Mandamus* will not issue to an officer to require the doing of a thing that has already been done, although the person in whose favor the act was performed may have been entitled to the performance of it upon other grounds than those upon which it was performed; and where it appears, under the indefinite allegations of an alternative writ, that a person claiming the right to be licensed as a practicing physician has already been granted this license by the officer whose duty it would be, in a proper case, to issue it, this is held as an additional reason for refusing the writ of *mandamus* to compel the issuance of such license.—WEEDEN v. ARNOLD, Okla., 49 Pac. Rep. 916.

37. MASTER AND SERVANT—Contract of Employment—Construction.—A contract between a corporation and a workman who has received injuries while in its service, that he shall be paid a given rate of wages per month, and shall render such services as he can, without any stipulation as to duration, is not an undertaking to pay such workman an annuity during the remainder of his life, but a contract of employment by the month, which may be terminated by either party at the end of any month.—TENNESSEE COAL, IRON & RAILROAD CO. v. PIERCE, U. S. C. C. of App., Fifth Circuit, 81 Fed. Rep. 814.

38. MUNICIPAL CORPORATIONS — Defective Streets—Contributory Negligence.—The streets, including the sidewalks, of the cities of this territory are dedicated to the public use, and, if an abutting proprietor or occupant makes an excavation in the sidewalk, for the convenience and advantage of his adjacent property, it is an invasion and appropriation, to that extent, of a public user and, having made the appropriation, he cannot, by reason of it, create a cause of action in his own favor against the city, notwithstanding the fact that the city may itself have been at fault and negligent in contributing to the cause of the injury complained of. Such an excavation by an abutting proprietor, resulting in injury to him, is contributory negligence.—CITY OF GUTHRIE v. NIX, Okla., 49 Pac. Rep. 918.

39. NEGLIGENCE—Owner of Vessel—Liability to Stevedore.—An employee of a company of stevedores unloading a vessel may maintain an action for damages against the owners of the vessel for injuries received by reason of stepping on the cover of a manhole on the deck which the owners had carelessly and negligently permitted to become defective, out of repair, and unsafe.—CLIFFE v. PACIFIC MAIL S. S. Co., U. S. C. C., N. D. (Cal.), 81 Fed. Rep. 809.

40. NEW TRIAL—Verdict against Evidence.—Though a trial judge may exhibit his dissatisfaction with a verdict by setting it aside as "against the evidence," and in such case his dissatisfaction cannot be questioned, if there was evidence *pro* and *con* considered by the jury and by him in setting it aside, such dissatisfaction must be as to the finding on an issue, and not merely with a finding as to the amount of recovery; and he cannot set aside a verdict in an action of tort, on motion of the successful party, on the ground of inadequacy, unless it appears to be the result of passion, prejudice, corruption, unaccountable caprice, or other improper influences.—JENKINS v. HANKINS, Tenn., 41 S. W. Rep. 1028.

41. OFFICE AND OFFICERS—City Treasurer—Warrants.—Under charter provisions requiring the city treasurer to receive and safely keep all moneys of the city coming into his hands, and pay the same out on warrants and orders signed by the mayor and recorder, it is not his duty, and he therefore cannot be compelled, to make a partial payment on a warrant, though he is directed to do so by the city council.—STATE v. GRANT, Oreg., 49 Pac. Rep. 855.

42. PARTNERSHIP—What Constitutes.—One who owns a share in the assets of a firm, and has a one-third interest in the profits of the continued conduct of the business, but who is excluded from any control in such business, is not in partnership with such firm, as between the parties.—WORMSER v. LINDAUER, N. Mex., 49 Pac. Rep. 896.

43. PRINCIPAL AND AGENT—Authority.—An agent of a non-resident loan company negotiated a loan and was named trustee in the deed given to secure the loan. He continued to be the company's agent for the transaction of all its business where the loan was made, and was collecting its money, and loaning its funds: Held, that he had authority, even as against the company, to declare money secured by said trust deed to be due, and to sell the lands under such deed, and to make deeds to the purchaser, and to receive the money paid by him. — EDINBURGH AMERICAN LAND MORTG. CO. v. BRIGGS, Tex., 41 S. W. Rep. 1036.

44. PRINCIPAL AND AGENT — Authority to make Negotiable Notes.—The authority of an agent with power to execute negotiable instruments is confined to the making of such paper in the legitimate business of the principal, or for his benefit, and does not extend to the making of a note in his principal's name for the benefit of, or as security for, a third person. — BOORD v. STRAUSS, Fla., 22 South. Rep. 713.

45. RAILROAD COMPANY. — A statute which provides that, in case of the refusal of a (railroad) corporation or its agents to take and transport any passenger or property as provided in the preceding section, or in case of the neglect or refusal of such corporation or its agents to discharge or deliver passengers or property at the regularly appointed places under the laws which regulate common carriers, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of action, imposes no duty upon the railroad company to erect stations or warehouses for receiving and delivering freight. — CHADDICK v. LINDSAY, Okla., 49 Pac. Rep. 940.

46. RAILROAD COMPANY — Fires—Negligence.—A railroad company allowed inflammable material to collect upon its right of way. It was discovered to be ignited within five minutes after a freight train passed. The fire spread, burning property of an adjoining owner. It was shown that fire could not have originated from smoldering embers in the ground: Held, sufficient to

raise a presumption that the fire was started by the negligence of the company, which it was the duty of the company to rebut.—RICHMOND v. MCNEILL, Oreg., 49 Pac. Rep. 880.

46. RAILROAD COMPANY—Omission of Signals at Crossing. — Under Mill. & V. Code Tenn. § 1298, requiring overseers of public roads to erect a sign at each railroad crossing, and providing that "no engine driver shall be compelled to blow the whistle or ring the bell at any crossing unless it is so designated," the servants in charge of a train are not required to give a warning of any kind of the approach of a train to a crossing not so designated.—SOUTHERN RY. CO. v. ELDER, U. S. C. C. of App., Sixth Circuit, 81 Fed. Rep. 791.

47. RAILROAD COMPANY—Street Railroads — Accident at Crossing. — A driver of a vehicle, before attempting to cross an electric street-railway track at a street intersection, is not bound a t his peril to know that a collision will not occur, and need only make such observation and acquire such information as would convince a reasonably prudent man, in a like situation, that the passage could be made in safety. — SAUNDERS v. CITY & SUBURBAN R. Co., Tenn., 41 S. W. Rep. 1031.

48. RAILROAD MORTGAGES — Claims for Purchase Money of Right of Way. — Railroad mortgage bondholders, who, by virtue of a future-acquired property clause in their mortgage, obtain an interest in or lien upon lands condemned for the use of the company, hold subject to the claim of the prior owner for the purchase money. — CENTRAL TRUST CO. OF NEW YORK v. LOUISVILLE, ST. L. & T. RY. CO., U. S. C. C., D. (Ky.), 81 Fed. Rep. 772.

49. REMOVAL OF CAUSES — Diverse Citizenship — Corporations. — Where neither party resides in the State where suit is brought, and the sum in dispute exceeds $2,000, defendant may have the suit removed to the Circuit Court of the United States in a district where neither party resides, under Act March 3, 1887 (24 Stat. 552) §§ 1, 2, as amended and corrected by Act Aug. 13, 1888 (25 Stat. 433), providing that where the sum in dispute exceeds $2,000 a non-resident defendant may have the suit removed to the Circuit Court of the United States, if the parties are citizens of different States, notwithstanding the further provision of section 1 that such suit shall be brought only in the district of the residence of either plaintiff or defendant, since such further provision was enacted solely for the benefit of defendant, who may waive it.—KOSHLAND v. NATIONAL FIRE INS. CO. OF HARTFORD, Oreg., 49 Pac. Rep. 846.

50. SALES—Assumpsit.—When goods are sold, to be delivered at a place named at a future time, and before delivery they are accidentally lost or destroyed, the loss falls upon the buyer if at the time of the loss the title had passed to him; otherwise the seller must bear the loss.—DUDLEY v. POLAND PAPER CO., Me., 38 Atl. Rep. 157.

51. SALES—Rescission for Fraud—Tender of Price.—A seller who received notes of third parties as part of the price cannot, on the ground that the notes are worthless, excuse his failure to return or tender them before rescission of the sale. — CROSSEN v. MURPHY, Oreg., 49 Pac. Rep. 858.

52. SHERIFF — Assault on Prisoner.—It is the duty of the sheriff to safely keep and protect the prisoners in his charge from unlawful injury, and, if unlawful assaults are made upon such prisoners in the county jail by others who are confined therein, the sheriff will be responsible in an action for damages to the prisoner suffering the injury, if the sheriff and his deputies or jailer in his employment, or deputed by him, are aware of the contemplated assault, and do not use every reasonable means to prevent it. Such neglect on the part of either the sheriff, deputies, or jailer is a failure to "faithfully perform" the duty of sheriff.—HIXON v. CUPP, Okla., 49 Pac. Rep. 927.

53. TAXATION — Assessment — Listing.—The law presumes that a taxing officer on whom is imposed a specific duty has regularly performed his duty, and that the proceeding in the required respect was regularly performed; and in an attack made against the levy and collection of the usual and ordinary taxes on the ground that the assessment list was not taken by the required officer it will be presumed that the listing was regularly done, until the contrary clearly appears. —PENTECOST v. STILES, Okla., 49 Pac. Rep. 921.

54. TAXATION—Cattle—Situs.—While it may be stated, as a general proposition of law, that personal property has no *situs* except that of the domicile of the owner, yet this doctrine yields wherever it is applied to the taxation of personal property.—PRAIRIE CATTLE CO. v. WILLIAMSON, Okla., 49 Pac. Rep. 937.

55. TRESPASS QUARE CLAUSUM — Right of Way. — Defendant in an action of trespass on the freehold need not plead or prove his defense of right of way by necessity, when such right is conceded by plaintiff.—JENNE v. PIPER, Vt., 38 Atl. Rep. 147.

56. TRIAL — Misconduct of Jury. — Conversation between jurymen in the jury box is not of itself misconduct, and, unless it be shown to have improper reference to the evidence or merits of the case, and be prejudicial to defendant, it will not work a reversal.—PEOPLE v. KRAMER, Cal., 49 Pac. Rep. 842.

57. TRIAL — Remarks of Court. — Where the circumstances in proof in a case are of such a character as to make the proper finding upon the material issue in the case dependent upon the untrammeled determination of the jury upon various hypotheses of fact, it is error for the judge to make the following remarks to the jury, for the purpose of correcting the argument of law to the jury by counsel in the cause, viz.: "The jury must obey the instructions of the court, and if you disobey the instructions of the court you will be guilty of contempt of court, and the court can punish you." There should be nothing in the intercourse of the judge with the jury having the least appearance of duress or coercion.—PRICE v. CARTER, Fla., 22 South. Rep. 715.

58. TRUSTS — Evidence.—The books of account of an absconding probate judge, showing that certain funds in his hands as trustee were used to purchase certain notes, are admissible to prove that fact, even although not admissible to show that subsequent holders had notice of the fiduciary capacity in which the judge acquired them.—FREEMAN v. BAILEY, S. Car., 27 S. E. Rep. 686.

59. VENDOR AND PURCHASER—Specific Performance.—To justify the court sitting in equity to compel specific performance, and compel a defendant to make a conveyance, the plaintiff must show that he has a clear title to the conveyance prayed for. A doubtful or contingent title is not sufficient; it must be a complete and perfected title.—GLIDDEN v. KORTER, Me., 38 Atl. Rep. 159.

60. WATERS—Irrigating Rights.—A prior appropriator of water of a certain stream cannot so increase his demands and use of the water as to deprive a subsequent appropriator of his rights acquired before such increased demands and use.—BECKER v. MARBLE CREEK IRR. CO., Utah, 49 Pac. Rep. 892.

61. WATERS — Water Rights — Appropriation. — One who has several years heretofore filed notice that he claimed an appropriation of a certain amount of water for agricultural purposes, but has made no additional or other use of the water than he had prior to that time, can claim no additional rights by reason thereof. —SMYTH v. NEAL, Oreg., 49 Pac. Rep. 850.

62. WITNESS — Husband and Wife—Confidential Communications.—Code Civ. Proc. § 1881, subd. 1, provides that neither husband nor wife can be examined, without the consent of the other, "as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other:" Held, that this rule of evidence applies to all criminal actions except those for crimes committed by either husband or wife against the other.—PEOPLE v. WARNER, Cal., 49 Pac. Rep. 841.